A

PP

lwn.

HO SEK KONG

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDULL HAMID EMBONG J
[CRIMINAL TRIAL NO: 45-25-2001]
28 NOVEMBER 2005

C ***CRIMINAL LAW:*** *Penal Code - Section 302 - Murder - Statement made by accused - Whether could be classified as plenary confession - Whether there was an irresistible inference that accused had committed murder - Evidence Act 1950, s. 17(2) - Circumstantial evidence - Whether prosecution established prima facie case - Whether defence raised*
D *reasonable doubt - Penal Code, s. 300 (b), (c), (d)*

The accused was charged with the murder of his mother ('deceased'). The evidence led by the prosecution was that on the evening of 5 October 2000, just after 6pm, the body of the
E deceased was seen by one SP4 lying in a pool of blood on the floor in her bedroom at her apartment house. SP4 immediately left the room and saw the accused coming out of the bathroom. The accused told SP4 that he had done something to the deceased but he had not intended to do it. The accused then left the
F house; SP4 followed him. Thereafter, SP4 went to fetch the daughter of the deceased ('SP3') from work. SP3, in her evidence, stated that at 5pm that day she had called home and was told by the accused that her mother was sleeping and on the same day at 7pm, the accused had informed her that the deceased had
G vomited a lot of blood. When SP3 arrived home, she saw a lot of blood in the guest room of the house. The accused told her, on being questioned, that he did not know what had happened. The court had made an assessment on SP4 and found that he was truthful in his answers particularly under cross examination, and he
H was found to be a credible witness. As such, SP4's narration of the events on that fateful evening, in particular what the accused had said and the conduct of the accused, was accepted by this court as the truth. The prosecution's case herein rested solely on the confession of the accused and the circumstantial evidence
I supporting that confession in making out a *prima facie* case against the accused.

Held (finding the accused guilty as charged and sentencing him to death):

[1] The statement uttered by the accused to SP4 was not merely that he had a knowledge that an offence had been committed but a direct acknowledgment of his guilt. His statement could be classified as a plenary confession. It suggested an inference that the accused had committed this murder, thus falling within the clear terms of s. 17(2) of the Evidence Act 1950. (pp 55 I & 56 A)

[2] The confession of the accused was voluntarily made to SP4. There was no allegation that the accused had uttered it due to any inducement. No serious challenge was raised that the confession was actually made by the accused. The confession was made under a feeling of sheer remorse and manifested an acknowledgment that he had committed the act against the deceased. The fact that the accused had said that he had not intended to do it did not make the confession exculpatory. (p 56 G - H)

[3] Besides the confession of the accused there were also circumstantial evidence which if considered together with the confession pointed irresistibly to the guilt of the accused in perpetrating this murder. The accused was proved to be alone and the last person together with the deceased in the house. This fact was not in dispute since in his own evidence the accused had stated that he was at home the whole day. Taken together with his own confession, the court could make an inference of his guilt. (p 57 D - F)

[4] It was pertinent to note that at about 5pm to 6pm on that fateful evening, SP2, the neighbour, had heard noises from the accused's house, although it was not explained what the noises were. Later, when SP4 and the accused left the house, the accused had told SP4 not to do anything and pretend that SP4 had not seen anything. This peculiar conduct of the accused immediately after the recovery of the deceased lying in a pool of blood was most peculiar and suspicious. The court took this as one of the circumstantial evidence, which taken together with the other facts and circumstances had the cumulative effect of bringing home the reasonable and irresistible inference that the accused had committed the murder. (p 58 B - D)

[5] SP9, a forensic expert, undertook a post mortem examination on the deceased and found 55 wounds consisting of abrasions and lacerations of various degrees on the dead body. There were also defence wounds on the forearms. The injuries were a result of blows to the body using a blunt object. The injuries to the deceased's head were fatal and SP9 opined that those injuries were consistent with a homicidal attack. The cause of death was determined as 'head injury due to multiple blunt trauma.' SP9 also visited the scene of the crime when the deceased's body was still there and saw the blood stains on the floor, walls and the bed. He found the deceased's head to be in a big pool of blood suggesting that the deceased had been beaten several times on the head and that the injuries to the head were serious. SP9 also testified that the blood stains on the walls were that of spatters and sprays, the latter being the result of incised wounds with a sharp object. This court accepted the opinion of SP9 and concluded that the deceased was brutally attacked with a blunt instrument and had succumbed to her wounds, notably those on her head. The court found that the accused had intended to cause his mother's death when he inflicted those injuries upon her. His act fell within subsections (b), (c) and (d) of s. 300 of the Penal Code. (pp 58 F - I & 59 A - E)

[6] There was nothing in the defence which merited any consideration as a defence that could raise a reasonable doubt in the prosecution's case. In his testimony, the accused had not adverted to his confession, save for a total denial. He also did not refer to the telephone conversations he had with his sister, SP3 and to the fact that he had told SP3 that the deceased had vomited a lot of blood. A total appraisal of the accused's evidence showed nothing more than a bare denial which in law was not a true defence. (p 60 E - F)

[7] The prosecution had, at the end of the trial, succeeded in discharging its legal burden of proving its case beyond a reasonable doubt; and that the defence had not shed any reasonable doubt on the prosecution's case. The accused person was guilty and convicted on the charge. (p 61 G)

[Accused shall suffer the sentence of death by hanging as provided by s. 302 of the Penal Code and s. 277 of the Criminal Procedure Code.]

Case(s) referred to:
Alcontara Ambrose Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Anandagoda v. The Queen [1962] 1 WLR 817 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Chwen Kong v. PP [1962] 28 MLJ 307 ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 MLJ 232 ***(refd)***
Lemanit v. PP [1965] 2 MLJ 26 ***(refd)***
Liew Kon Kiow v. PP [1948-49] MLJ Supp 150 ***(refd)***
Mat v. PP [1963] 29 MLJ 263 ***(refd)***
Mohd Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
PP v. Lin Lian Chen [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
State v. Shaik Mazhar AIR [2001] SC 2427 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 277, 302
Evidence Act 1950, s. 17(2)
Penal Code, s. 300(b), (c), (d)

Other source(s) referred to:
Sarkar on Evidence, 15th edn, reprint 2003, p 423

Reported by Suhainah Wahiduddin

JUDGMENT

Abdull Hamid Embong J:
The accused is charged with the murder of his mother on the following amended charge:

> Bahawa kamu pada 5 Oktober 2000, di antara jam 4.00 petang hingga 6.30 petang di rumah beralamat Blok 44-6-11, Taman Naga Emas, Jalan 4/140, Salak Selatan, dalam daerah Brickfields, dalam Wilayah Persekutuan Kuala Lumpur, telah melakukan pembunuhan dengan menyebabkan kematian ke atas CHEAH SEAW MENG (KP: 481019-10-5356). Oleh yang demikian kamu telah melalukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

The evidence led by the prosecution is simple and straight forward and may be shortly stated thus.

On the evening of 5 October 2000, just after 6pm the deceased body was seen by SP4 lying in a pool of blood, on the floor, next to her bed in her bedroom at her apartment house at Blok 44-6-11, Taman Naga Emas, Salak Selatan. That house was then occupied by the deceased, her son Ho Sek Kong (the accused), her adopted son Lee Loy Fatt, her daughter, Ho Kwai Ying (SP3) and her boyfriend Lee Lai. SP4, Wan Kwang Woh who was then the boyfriend of SP3 also stayed over at that house on certain nights and had the keys to the house.

At 6pm on 5 October 2000, SP4 went back to his house at 103 Kampung Kerayung, Off Jalan Lapangan Terbang Lama, Kuala Lumpur. After that he left home to go over to SP3's house (ie, deceased's house). When he got there he found the wooden front door opened and the grille to it unlocked. When he went in he saw blood spluttered on the walls of the deceased's bedroom and her body lying on the floor next to the bed. He approached the body to take a look. He then immediately left the room to look for someone. Then he saw the accused coming out of the bathroom, clad only with a towel. The accused shouted something at him which he could not remember. The accused then asked him to sit, and told him that he (accused) had done something to the deceased but he had not intended to do it. SP4 said he understood what the accused meant. When SP4 asked the accused why he did it, the accused answered that he had not intended to do it. The accused was then alone in the house. The accused then asked SP4 to calm down and not to tell about the incident to his sister, SP3. The accused then went into his room to put on his clothes. Not long after the accused left the house; SP4 followed him. SP4 asked the accused what should be done and the accused told him not to do anything and to regard that he (SP4) had not seen anything. They then went into the lift. Nothing was said there as there were other people. When they reached the ground, SP4 again asked the accused what to do, and the accused asked SP4 to leave the place. SP4 then went back up to the house to fetch his helmet. He then left the house after locking up the grille. When he got to his house in Kerayung he called SP3 but there was no answer. He then left to fetch SP3 from her work place. When he met her, he saw SP3 in a state of panic. SP3 told SP4 that the accused had called her and told her that her mother was covered with blood. They then immediately went home and saw many people there whom he could not recognise.

SP3 in her evidence stated that at 5pm that day she had called home and spoke to the accused. When she asked for her mother the accused told her that she was sleeping. At 7pm the same day, she again called home and spoke to the accused. This time the accused told SP3 that the deceased had vomited a lot of blood. This evidence was not disputed in cross examination and as such accepted by the court as a true narration of what had transpired in their conversation. In *Wong Swee Chin v. PP* [1981] 1 MLJ 212, the Federal Court held that "there is a general rule that failure to cross examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony." When SP3 arrived home she saw a lot of blood in the guest room of the house. The accused told her, on being questioned, that he did not know what happened.

SP4 was also initially arrested as a suspect in this murder case. He admitted in court that he had lied to the police about the killing in order to protect the accused, and that the version he related to the court was truly what had transpired. SP4 was however not cross examined on what specifically his lie was to the police. This court's assessment on SP4 was that he was truthful in his answers particularly under cross examination, and I found him to be a credible witness inspite of his admission that he had previously lied to the police. As such his narration of the events on that fateful evening, in particular on what the accused said and the conduct of the accused was accepted by this court as the truth.

The prosecution's case rested solely on his confession and the circumstantial evidence supporting that confession in making out a *prima facie* case against the accused.

It is trite law that for such evidence to operate against the accused, the prosecution bears a heavy onus and that that evidence must irresistibly point to his guilt (see *PP v. Lin Lian Chen* [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285). It is not the quantity of circumstantial evidence that the court looks at, rather the quality of that evidence. Central to the set of circumstances pointing to the guilt of the accused was his confession to SP4 when the latter confronted the situation upon recovery of the deceased's body. SP4 had maintained even under lengthy cross examination that the accused had admitted to killing his mother

A but had not intended to murder her (see p. 20 notes of evidence). This court had admitted this confession under s. 17(2) of the Evidence Act which states that:

> (2) A confession is an admission made at any time by a person
B accused of an offence, stating or suggesting the inference that he committed that offence.

Under this section an inference can be made by the court that he had committed the crime because an inference can amount to a confession. In *Liew Kon Kiow v. PP* [1948-49] MLJ Supp. 150, it
C was stated by Spenser Wilkinson J that:

> In deciding what amounts to a confession and what does not, very little assistance can be derived from the English authorities because statements of any kind made to the police in England by
D accused persons are admissible provided they have not been obtained by improper means. The Indian authorities are of no assistance because sub-section (2) of our section 17 does not form part of the Indian Evidence Act, so that in India the word "confession" has been held to bear its ordinary everyday meaning of an admission of guilt.

E

The learned judge also went on to explain the phrase "suggesting the inference" by stating:

> It is quite clear from the words "or suggesting the inference" that something short of a full admission of guilt by the accused may
F yet be a "confession" within the definition. Whether, therefore, any particular statement amounts to a confession or not must depend upon the particular wording of the statement, the circumstances in which it is made and the charge to which the statement directly or indirectly refers.

G

> It seems to us that the words of the statement here in question, although innocent enough in themselves, when taken in conjunction with all the surrounding circumstances might be said to suggest the inference that the appellant committed the offence.

H It could therefore, following the general rule on admissions, be proved against the accused as the maker of that statement as a direct acknowledgment of his guilt. (See *Sarkar on Evidence* 15th edn. Reprint 2003, at p. 423). According to Sarkar's commentary, a confession may be defined as an admission of the offence by a
I person charged with the offence, which does not contain anything self-exculpatory. The statement uttered by the accused to SP4 is not merely that he had a knowledge that an offence had been committed but, in my view, a direct acknowledgement of his guilt.

ln other words, his statement can be classified as a plenary confession. Looking at that statement as a whole and without considering any other extrinsic facts, it suggested an inference that the accused had committed this murder, thus falling within the clear terms of s. 17(2) of the Evidence Act.

In *Lemanit v. PP* [1965] 2 MLJ 26, the Federal Court adopted this passage of Lord Guest in *Anandagoda v. The Queen* [1962] 1 WLR 817, in accepting both plenary and non-plenary confessions as admissible under s. 17 of the Evidence Act. Lord Guest said:

> The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts. In this connection their Lordships consider that the view expressed by Gratiaen J in *Seyadu v. King*, 'The test of whether an "admission" amounts to a "confession" within the meaning of section 17(2) must be decided by reference only to its own intrinsic terms' is correct. It is not permissible in judging whether the statement is a confession to look at other facts which may not be known at the time of which may emerge in evidence at the trial. But equally it is irrelevant to consider whether the accused intended to make a confession. If the facts in the statement added together suggest the inference that the accused is guilty of the offence then it is nonetheless a confession even although the accused at the same time protests his innocence.

The confession was voluntarily made to SP4. There was no allegation that the accused had uttered it due to any inducement. In fact no serious challenge was raised that the confession was actually made by the accused. The confession was made, in my view, under a feeling sheer remorse and manifested an acknowledgment that he had committed the act against the deceased. The fact that the accused said that he had not intended to do it, did not, in my considered view, make the confession exculpatory. Even if it was partly exculpatory, it may still be admitted under s. 17(2) of the Evidence Act Augustine Paul in his book on *Evidence: Practice and Procedure*, 3rd edn made the following observation:

A In *Public Prosecutor v. Abdul Rashid & Ors* [1993] 3 SLR 794 (HC) Rubin JC (as he then was) said that what section 17(2) purports to import and what the *Anandagoda* decision purports to signify is that a confession need not be an unqualified expression of guilt and added at page 814

B > Under our law, it is no more than a person's statement admitting to his involvement in the offence charged in any manner or form. Be it minor or major, direct or indirect, explicit or inferential and whether in exculpation or in earnest, irrespective of its object, so long as the statement
C > connects the accused in some way with the offence charged, it would be deemed a confession under section 17(2).

The test for what amounted to a confession would therefore be that the statement would relate the accused in some way to the offence for which he is charged.

D

Besides the confession of the accused, there were also circumstantial evidence, which if considered together with that confession point irresistibly to the guilt of the accused in perpetrating this murder.

E

The accused was proved to be alone and the last person together with the deceased in the house. This fact was not in dispute since in his own evidence the accused had stated that he was at home the whole day long and when he left the house at 6pm that
F fateful evening his mother was well and alive in the house. SP3 in her evidence had also stated that she called home at 5pm and the accused informed her that their mother was then sleeping.

According to the commentary in *Ratanlal & Dhirajlal's Law of Crimes* (p. 1425) "the fact that the accused and the deceased
G were 'last seen together' is a circumstance of an incriminating nature against the accused – But the mere fact that the accused was last seen together with the deceased does not necessarily lead to the irresistible inference that he had committed the crime." It cannot therefore be the sole basis for a conviction. However,
H taken together with his own confession, the court may make an inference of his guilt. (*State v. Shaik Mazhar (AIR)* [2001] SC 2427).

I

There were other circumstances found in the narration of the prosecution's case which brought this court, by irresistible inference, that it was the accused who murdered his mother. When SP4 arrived at the house he saw the accused coming out of the bathroom clad only in a towel. The accused had shouted to SP4 not to make any noise. It may also be pertinent to note that at about 5 to 6pm, SP2, the neighbour, had heard noises from the accused's house, although it was not explained what the noises were. Later, when they both left the house the accused told SP4 not to do anything and pretend that SP4 had not seen anything. This peculiar conduct of the accused immediately after the recovery of the deceased lyins in a pool of blood is most peculiar and suspicious to say the least. I had taken this as one of the circumstantial evidence, which taken together with the other facts and circumstances have the cumulative effect of bringing home the reasonable and irresistible inference that the accused had committed the murder.

No motive was shown by the prosecution for this needless murder. However in law, motive is not an essential ingredient for this offence. (See *Dato' Mokhtar bin Hashim & Anor v. PP* [1983] 2 MLJ 232). The prosecution had also failed in its attempt to admit as evidence the cautioned statement of the accused, after this court had held a voire dire to determine its voluntariness.

Dr. Shahrom Abdul Wahid (SP9), a forensic expert at the Pathology Department, UKM, undertook a post mortem examination on the deceased on the morning of 6 October 2000. He found 55 wounds consisting of abrasions and lacerations of various degrees on the dead body. There were also defence wounds on the forearms. The injuries were a result of blows to the body using a blunt object. The injuries to the deceased's head were fatal and SP9 opined that those injuries were consistent with a homicidal attack. The cause of death was determined as "head injury due to multiple blunt trauma". SP9 also visited the scene of the crime when the deceased's body was still there. He saw the blood stains on the floor, walls and the bed. He found the deceased's head to be in a big pool of blood suggesting that the deceased had been beaten several times on the head and that the injuries to the head were serious. SP9 also testified that the blood stains on the walls were that of spatters and sprays, the latter being the result of incised wounds with a sharp object. The estimated time of death was between 4pm till 9pm on 5 October

2000. This court accepted the opinion of SP9 and concluded that the deceased was brutally attacked with a blunt instrument, and succumbed to her wounds, notably those to her head.

Looking at the wounds from the post mortem photographs (P4) and after considering SP9's testimony this court found that the accused had intended to cause his mother's death when he inflicted those injuries upon her. His act fell within sub-sections (b), (c) and (d) of s. 300 of the Penal Code which states:

> Culpable homicide is murder:
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

There was no evidence of any provocation in the instant case. As such, upon a maximum evaluation of the evidence, the prosecution had successfully proven a *prima facie* case against the accused which this court had considered following the principle laid down in the recent Federal Court case of *Balachandran v. PP* [2005] 1 CLJ 85 which stated the following principle and test:

> As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond a reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt ...
>
> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case of the prosecution. If there is any such doubt, there can be no *prima facie* case.

The accused chose to give sworn testimony in his defence. The accused stated that he left the house that evening, at 6pm and that the deceased was then still at home, alive. He said that SP4 was also at home when he went out but on his return at 7.45pm SP4 was no longer there. This matter was however never put to SP4 during his cross examination, and was in direct contradiction with the evidence of SP4 who said that he went over to the house after work at 6pm. As such, this court rejected this evidence as a recent invention, an afterthought. (See *PP v. Lin Lian Chen* [1992] 4 CLJ). The weight of such evidence must necessarily be diminished. (See *Alcontara a/l Ambrose Anthony v. PP* [1996] 1 CLJ 705). Under cross examination by the learned Deputy Public Prosecutor, the accused denied that he had attacked the deceased as a result of a quarrel. He also denied that he had a shower before leaving the house, and that he was surprised to see SP4 in the house when he came out of the bathroom. He further denied that he told SP4 on what had happened.

There was nothing in the defence which merits any consideration as a defence that could raise a reasonable doubt in the prosecution's case. In his testimony, the accused had not adverted to his confession, save for a total denial. He also did not refer to the telephone conversations he had with his sister, SP3 and to the fact that he had told SP3 that the deceased had vomited a lot of blood. A total appraisal of the accused's evidence shows nothing more than a bare denial which in law is not a true defence. The duty now on the accused is only to cast a reasonable doubt on the prosecution case; he is not required to prove his innocence (see *Mohd Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311). This is now the question that this court needs to address, even when disbelieving the story of the accused (*Mat v. PP* [1963] 29 MLJ 263). In the instant case however there was no explanation forthcoming to even consider whether it had raised a reasonable doubt on the prosecution's case.

Although the burden of proof in a criminal trial lies throughout on the prosecution in bringing home a conclusion that it had proven its case beyond a reasonable doubt, the accused, if called upon to his defence bears the evidential burden of casting that doubt. Thus, if for instance, he chooses to merely remain silent, then having found a *prima facie* case which has been evaluated on a maximum evaluation test, the court may, without more, conclude

A that the prosecution has successfully proven its case beyond a reasonable doubt. The Federal Court in *Balachandran v. PP* [2005] 1 CLJ 85, states the law in the following way:

> Proof beyond reasonable doubt involves two aspects. While one
B is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon
C a consideration of all the evidence adduced as provided by s. 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence.

This aspect of proving a case beyond a reasonable doubt has
D remained steadfast over the years. Over fifty years ago, in the Court of Appeal in *Chan Chwen Kong v. PP* [1962] 28 MLJ 307 enunciated the same principle in the following words of Thomson CJ:

> In most criminal cases there is at some stage an onus of a sort
E upon the accused person. Once the prosecution produces evidence which if believed would support a conviction there is a tactical onus on the accused person either to produce evidence on his own or to point to something in the prosecution evidence that at the very lowest make the trier of fact less than sure of any
F conclusions he might otherwise be prepared to base upon the prosecution evidence. If he fails to discharge that tactical onus he will be convicted. That is very true.

For these reasons, this court had found that the prosecution had, at the end of the trial, succeeded in discharging its legal burden
G of proving its case beyond a reasonable doubt; and that the defence had not shed any reasonable doubt on the prosecution's case. The accused person was found guilty and convicted on the charge. He shall suffer the sentence of death by hanging as provided by s. 302 of the Penal Code and s. 277 of the Criminal
H Procedure Code.

I